

STATE OF MICHIGAN
COURT OF APPEALS

FIA CARD SERVICES, NATIONAL
ASSOCIATION,

UNPUBLISHED
January 12, 2012

Plaintiff-Counterdefendant-
Appellee,

v

MICHAEL D. WEIKLE,

No. 301901
Washtenaw Circuit Court
LC No. 10-000393-CK

Defendant-Counterplaintiff-
Appellant,

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

In this action alleging breach of a credit card agreement, defendant appeals as of right the trial court's order granting summary judgment in favor of plaintiff as to its complaint and dismissing defendant's counterclaim with prejudice. We affirm.

This case arises out of a credit card agreement that originated in 1997. Defendant used the card and made payments on the balance until February of 2009. Plaintiff brought this suit in April of 2010, alleging that defendant refused to pay the outstanding account balance according to the terms of the agreement and asserting claims based on breach of contract, account stated, and unjust enrichment. In his answer to plaintiff's complaint, defendant raised a number of affirmative defenses, including failure to state a claim, waiver, estoppel, laches, unclean hands, and acquiescence. Defendant also set forth a counterclaim, alleging causes of action for fraud in the inducement, breach of the covenant of good faith and fair dealing, predatory lending, unjust enrichment, and violations of the Truth in Lending Act (TILA), 15 USC 1601 *et seq.*, and Regulation Z, 12 CFR 226.1 *et seq.* The trial court subsequently granted plaintiff's motion for summary disposition on both its claim and defendant's counterclaim.

The trial court record is unclear as to which subsection of MCR 2.116(C) it relied on in granting plaintiff's motion for summary disposition. However, documentary evidence was presented to the court in support of plaintiff's motion. For this reason, we construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 183-184; 551 NW2d 132 (1996). "A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo on appeal." *Young v Sellers*, 254 Mich App 447, 449;

657 NW2d 555 (2002) (citation omitted). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) when the court, considering the documentary evidence in the light most favorable to the nonmoving party, *id.*, determines that “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law,” MCR 2.116(C)(10). The party moving for summary disposition is required to specifically identify the issues as to which there are no genuine issues of material fact and provide support for the motion in the form of affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Maiden*, 461 Mich at 120-121. “When a motion under subrule (C)(10) is made and supported as provided in [the] rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in [the] rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4); see also *Maiden*, 461 Mich at 120-121.

In this case, plaintiff was properly granted summary disposition with respect to its complaint pursuant to MCR 2.116(C)(10). Under Michigan law, a party seeking recovery for breach of contract must show the existence of the contract, prove the terms of the contract, establish that the opposing party breached the terms, and show that the breach caused an injury. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990); *Synthes Spine Co, LP v Calvert*, 270 F Supp 2d 939, 942 (ED Mich, 2003). Plaintiff provided evidentiary support for its claims. With its complaint, plaintiff submitted a copy of the cardholder agreement in effect at the time of default and an affidavit of account stated pursuant to MCL 600.2145. The affidavit was made within ten days preceding the complaint. As such, the affidavit satisfied the requirements of MCL 600.2145 to create an account stated. Because defendant failed to submit a counteraffidavit as provided for in MCL 600.2145, the affidavit provided prima facie evidence of defendant’s indebtedness. See MCL 600.2145; *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 435; 683 NW2d 171 (2004), rev’d in part on other grounds 472 Mich 192 (2005). In addition, with its summary disposition motion, plaintiff submitted, along with the affidavit and cardholder agreement, a copy of defendant’s signed application for the credit card and copies of monthly credit card statements sent to defendant’s residence. Defendant acknowledges that he used the card and that he stopped making payments on the balance, as reflected by the account statements. This evidence, even when viewed in the light most favorable to defendant, indicates that a valid contract existed between plaintiff and defendant, that defendant breached the contract by failing to make payments as required, and that plaintiff suffered economic injury as a result. Further, the monthly statements and the cardholder agreement presented evidence of the terms of the agreement.

Because plaintiff filed and supported its motion for summary disposition, the burden shifted to defendant to show the existence of a genuine issue of material fact. Defendant, however, offered no substantively admissible evidence in response to plaintiff’s motion. Instead, defendant simply relied on the allegations in his answer and contended that discovery would provide the necessary evidence of plaintiff’s fraudulent business practices. This argument ignores the court-rule requirement that a party opposing a properly supported motion for summary disposition must provide admissible documentary evidence establishing a genuine issue of material fact for trial. MCR 2.116(G)(4). Because defendant failed to meet his burden,

the trial court properly granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We note that defendant adamantly argues that summary disposition was improper because the original agreement from 1997 was never produced; however, the argument fails to appreciate that the subsequent cardholder agreement in effect at the time of the default governed plaintiff's contract action and was produced. Additionally, defendant spends a great deal of time discussing United States Senate proceedings addressing questionable and deceptive credit card lending practices. But those proceedings do not constitute admissible evidence here, nor do they form a legal basis to preclude summary disposition. Defendant needed to connect the actual terms in the controlling credit card agreement with a violation of law that would excuse his performance; he did not do so.

We disagree with defendant's contention that summary disposition was not appropriate before discovery was complete. Summary disposition is generally premature where discovery is not complete. *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992). "However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Id.* "[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists." *Mich Nat'l Bank v Metro Institutional Food Serv, Inc.*, 198 Mich App 236, 241; 497 NW2d 225 (1993) (citation omitted). Mere speculation that additional discovery might produce evidentiary support is not sufficient. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540-541; 687 NW2d 143 (2004). In this case, defendant fails to assert what evidentiary support he expects to uncover, or how such evidence would support his position. Further, plaintiff has provided evidence, through the credit card agreement and the monthly account statements, demonstrating how fees and interest were calculated and applied to defendant's account and detailing the charges on the account. Defendant does not identify errors in plaintiff's calculations of fees and interest and does not contest any of the charges on the account. Under the circumstances, defendant's assertion that discovery will uncover additional support for his claims is the type of speculation that is insufficient to sustain a claim in the face of a motion for summary disposition.

Although defendant raised affirmative defenses to plaintiff's claim, he failed to offer argument or factual support for those defenses in response to plaintiff's motion for summary disposition. And he fails to address the affirmative defenses on appeal, other than to reference them, claim that he is entitled to a set off of plaintiff's damages based on the defenses, and again assert that he must be afforded discovery to uncover factual support for his defenses. Where, as here, issues are given only cursory consideration, this Court is not required to address the issues. See *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 536-537; 593 NW2d 190 (1999). "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Id.* at 537.

Summary disposition was also appropriate with respect to defendant's counterclaim. The basis of defendant's counterclaim consisted of allegations that plaintiff failed to disclose various terms and conditions of the agreement and that plaintiff's policies and procedures were deceptive and unfair. However, defendant, although he acknowledged having received disclosures from plaintiff, offered no specific allegations or evidence as to the contents of those disclosures or the circumstances under which he received them. Defendant also failed to offer evidence showing that the claimed practices were applied to his account or demonstrating that he suffered damages

as a result. Furthermore, defendant conducts no legal analysis of his alleged causes of action. With its motion for summary disposition, plaintiff offered a credit card agreement, signed application, monthly account statements, and an affidavit of account stated, pursuant to MCL 600.2145, as substantively admissible evidence in support of its motion to dismiss defendant's counterclaim. This evidence supports a finding that plaintiff acted in good faith and fully disclosed the terms and conditions of the agreement, that defendant accepted those terms by using the card, that plaintiff calculated interest and fees on the account in accordance with the agreement, and that the unpaid balance on the account was \$38,887. Defendant offered no contradictory substantively admissible evidence in support of his counterclaim. As a result, defendant failed to establish a genuine issue of material fact. And, as previously noted, defendant offers no basis for his contention that further discovery will uncover evidentiary support for his claims. Therefore, summary disposition of his counterclaim was proper pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter